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IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1980

AMERICAN SOCIETY OF MECHANICAL ENGINEERS,
PETITIONER
V.
HYDROLEVEL CORPORATION,
RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF
AND
BRIEF OF AMICUS CURIAE,
THE LEGAL FOUNDATION OF AMERICA

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NO. 80-1765

AMERICAN SOCIETY OF MECHANICAL ENGINEERS,
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on writ of certiorari to the United States
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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Legal Foundation of America moves for leave to file the annexed brief as amicus curiae, and would respectfully show this Court as follows:

1. Interest of Amicus Curiae: The Legal Foundation of America is a nonprofit, tax-exempt corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve economic freedom, to remove unnecessary regulation, and to protect the principle of limited government. During the present year, LFA has supported the market system and opposed unreasonable regulation in such diverse industries as commercial lending, uranium mining, broadcasting, health care and natural gas production. In this endeavor, it has appeared in this Supreme Court, in the courts of appeals, in United States district courts and in State courts. All litigation undertaken by LFA is approved by its Board of Trustees, the majority of whom are attorneys. LFA does not accept private fees and is supported by grants and contributions from individuals, foundations and corporations.

2. Amicus' Use of Volunteers: The positions taken by LFA are sometimes inconsistent with the economic interests of businesses seeking government intervention and have occasionally subjected it to criticism by those it has opposed. The reasoning of the Court of Appeals in the case at bar, which creates a kind

of strict liability under the antitrust laws for the conduct of volunteers, could be used against LFA by such opponents. LFA relies heavily upon the services of volunteers who have other regular employments. It has been donated the services of partners and associates in firms among the nation's largest, as well as solo practitioners, law professors, and attorneys in government service. Like petitioner ASME in this case, LFA has no reasonable means of assuring that an isolated action taken by one among many pro bono litigators purportedly on its behalf is not undertaken falsely, fraudulently or without authorization, to further the interests of an employer of a volunteer rather than LFA. The deep intrusions it would need to make into the private business of every volunteer's employer, in order to do so, would be unreasonable for LFA, the volunteer and the employer alike.

3. Desirability of an Amicus Curiae Brief: An amicus curiae brief is desirable here because the opinion of the Court of Appeals is a novel interpretation of the antitrust laws that depends upon analogies to other, unrelated claims such as trade libel. Amicus curiae believes, and would show this Court, that the analogies are strained. The law of trade libel, for example, is carefully limited to avoid precisely the result reached by the Court of Appeals, because much of the history of its development concerns the protection of a free flow of information about products. The failure of the Court of Appeals to provide "breathing space" for such communications is so pronounced that it not only misconstrues the antitrust laws, but impinges upon speech protected by the first amendment as well. Furthermore, amicus curiae would show that the Court of Appeals' opinion will have its greatest adverse impact upon precisely those professions that set meaningful, high standards for their members. As a result, it will create necessity for a greater role of government in setting standards for industries and professions, and government in that role is likely to retard new product development far more substantially than the voluntary industry standards that are the subject of this action.

4. Coverage of this Brief: LFA has examined the briefing that occurred in the Court below. This brief does not duplicate the

careful and detailed case law arguments that it may be expected petitioner ASME will make. Instead, it concentrates on issues of economics, public policy and history relevant to the application of the antitrust laws, which, it is believed, will not be argued elsewhere as they are argued here.

For these reasons, the Legal Foundation of America requests that its motion for leave to file the annexed brief be granted.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA

INTEREST OF AMICUS CURIAE

Amicus curiae adopts the statements in paragraphs 1 and 2 of the Motion for Leave to File Amicus Curiae Brief preceding this brief, as showing the interest of amicus curiae.

STATEMENT OF THE CASE

A. The ASME Communications Allegedly Constituting Participation in a "Conspiracy" to "Restrain Trade"

Officers of McDonnell & Miller, Inc. ("M&M") sent an inquiry to the American Society of Mechanical Engineers ("ASME"), requesting interpretation of its Boiler and Pressure Vessel ("BPV") Code. This was one of 20,000 to 30,000 such inquiries to which ASME responds annually, without charge. In accordance with ASME's procedures manual for its BPV Committee, a full-time ASME officer named Hoyt obtained information necessary to answer the inquiry from the chair of the heating subcommittee, one Hardin. Hardin's actual employment was as vice president of a boiler insurance company, Hartford Steam ("Hartford"). He was one of more than 10,000 volunteers who function annually as

members of ASME committees without compensation. He had counselled M&M in the drafting of the letter, although he did not sign it and did not disclose his participation.* Hoyt, the full-time ASME employee, used the information thus provided by Hardin, the subcommittee chair, to respond to the M&M inquiry.

The inquiry and the response both concerned the application of one section of ASME's more than 400 codes and standards—the 18,000-page BPV Code—to low water boiler fuel cutoffs. Such devices prevent unduly low water levels, which can result in "dry firing" and boiler explosions. The inquiry letter asked whether a time-delay, allowing water to fall below visible range, would comply with a Code section that required an "automatic cutoff" before the lowest visible portion was reached in the gauge glass.

The ASME response to this inquiry furnished by Hoyt began, as interpretation of a code or standard should, with an analysis of the purpose of the BPV Code language at issue. It pointed out that the automatic cutoff requirement called for a "safety feature" rather than an "operating control." Hence it should provide an assurance of safety. Thus the Hoyt letter made the common-sense and factually accurate response, under the circumstances given in the inquiry, that "there would be no positive assurance that the boiler water would not fall to a dangerous point during a time-delay period." Since ASME policy prohibits comment on specific products, the letter was in general terms. It did not state that any particular time-delay, properly used, would necessarily violate the Code; it responded to the inquiry, which specifically concerned a time-delay that would allow water to fall below the visible range.

Upon receipt of this communication, M&M used it in marketing its cutoff, falsely claiming that the Hoyt letter meant that a time-delay, as such, would "very definitely be against the

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* It was not, however, inappropriate for committee or subcommittee chairpersons to give advice concerning the manner of wording inquiries so as to facilitate meaningful responses.

ASME Code." Hydrolevel, which manufactured a competing device containing a time delay, complained to ASME of this sales technique, which was a misuse by M&M of both the BPV Code and the interpretive letter. In response to Hydrolevel's complaint, ASME promptly placed the matter on its agenda. After the next meeting of the BPV Committee, ASME issued a new communication expressly countering M&M's misstatement and flatly asserting that the Code was not intended "to prohibit the use . . . of time delays." ASME circulated this new statement to more than 300 individuals active in the boiler market and, in addition, sent an "official communication" confirming the new statement to Hydrolevel. ASME's BPV Committee followed this course even though Hydrolevel had failed, in response to notice, to have a representative present at the meeting. A Hydrolevel officer stated that the new statement removed any adverse implications as to time delays, and the Court of Appeals held that it removed even the possibility of subsequent harm to Hydrolevel from the interpretation by ASME.

B. The Antitrust Litigation

This series of events formed the basis of a suit by Hydrolevel against M&M (and ITT, which acquired it), as well as Hartford and ASME. The claims initially included various state law theories, such as trade libel, New York's Donnelly Act and others. A claim under the Sherman Act was also asserted. The gist of this latter claim was that a contract, combination or conspiracy in restraint of trade had been engaged in by M&M and Hartford, through the vehicle of ASME, and that it had caused Hydrolevel's business to decline. Before trial, Hydrolevel settled with ITT (for $ 725,000) and Hartford (for $ 75,000). Having thus ended its case against the two defendants who were "far more culpable" (in the words of the Court of Appeals) for these relatively small sums, Hydrolevel had a war chest with which to proceed to trial, with the hope that if it could prove liability against the most marginal defendant, ASME, it could recover very large damages.

Also before trial, Hydrolevel voluntarily abandoned the asser-

tion of any state law claims against ASME. It appears those claims would not have fit any conduct of ASME, even arguably. For example, ASME could not have been convicted of trade libel because it uttered no false statements, made statements only of opinion and not of fact, and made no statements concerning Hydrolevel's product.

At the conclusion of the evidence, the trial judge instructed the jury that unlawful acts of an agent could be attributed to a corporate entity only if they were within the scope of authority given by, and performed "in behalf of," the corporation. He further instructed the jury that ASME could be liable only if (1) its agents had acted to further its interests or (2) it had ratified the allegedly offending acts. This instruction should have led to a verdict against liability, since no evidence supported such a finding. The jury, however, found against ASME.* It was, indeed, a runaway jury; it assessed damages of $ 3.3 million, an amount so disproportionate to any supporting proof that the Court of Appeals remanded for a new trial.

C. The Court of Appeals' Holding on Liability: "Apparent Authority" and Reinterpretation of ASME's Interpretation

The Court of Appeals, however, affirmed the liability holding on a theory not briefed by the parties. It held that apparent authority of persons purporting to act for ASME was sufficient. Furthermore, it held that the evidence showed apparent authority on the part of the relevant persons (apparently, as a matter of law, since the jury did not pass on this issue). The Court of Appeals labelled its holding "stringent," but stated that such a holding was justified to make ASME act with greater care in all its transactions with volunteers. The Court reasoned that ASME must develop "review procedures" sufficient to prevent its inter-

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* As ASME pointed out in the Court of Appeals, it is clear that emotional jury argument and improperly admitted evidence contributed to this result.

pretations from being misused to do injury to a competitor by the activities of any of its more than 90,000 members or 10,000 volunteers.

The Court of Appeals reached this result, in part, by reinterpreting the ASME Code in a manner contrary to ASME's own interpretation. The conclusion that a time delay would "prevent positive assurance" of timely cutoff, said the Court, did not "follow from" the paragraph of the interpretive letter immediately preceding it. However, the issue that Hoyt was called upon to address was not whether this particular sentence "followed from" anything in the preceding paragraph, but how the inquiry should be answered in light of the ASME Code. The inquiry asked about a time delay after the water had reached the bottom of the gauge glass. Furthermore, the Court of Appeals failed to recognize that a time delay, even if the cutoff is activated at a point above the gauge glass, functions precisely because it "cuts off the cutoff"—it simply removes the safety device. It interposes between the cutoff and the boiler an additional mechanism subject to malfunction, and it may be subject to variations in the length of time delay. Since no particular time delay was specified, and the answer was couched in general terms proceeding from the safety purposes of the Code, it is submitted that the Court of Appeals' apparent holding—that the ASME interpretive letter was logically indefensible—was itself the product of a logical error.*

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* Furthermore, it involved the Court in a determination not authorized by anything in the Constitution or jurisdictional statutes.

Hydrolevel induced this holding by characterizing its device, during the appeal, as "fail-safe." Given the number of ways in which a malfunction can occur, this is a dangerous view of a safety device. Hydrolevel apparently made the assertion because its "probe" was primarily electronic rather than mechanical and depended upon the breaking of a circuit. The reasoning that it was thus rendered fail-safe is tantamount to the assertion that an elevator call button, a television set

SUMMARY OF ARGUMENT

Amicus curiae will not duplicate the case-law arguments expected to be made by counsel for ASME. Instead, this brief attempts to add economic and policy arguments.

I.

The strict liability approach inherent in the Court of Appeals "apparent authority" reasoning would punish those professional associations that set meaningful standards and reward those that adopt standards convenient to their members. Such a result would not amount to removal of a "restraint of trade."

II.

At the same time, the failure of professional self-regulation induced by this holding would create a corresponding need for greater government activity in the professions. This role of government would result in a compulsory rather than voluntary compliance system, loss of economic efficiency, diversion of taxpayer funds from other needs, and, ironically, a greater impediment to new product introduction than any professional association's voluntary standards would be likely to impose.

III.

ASME has been held liable here for the issuance of communications that are protected speech under the first amendment. The Court of Appeals' admittedly "stringent" approach to the case is inconsistent with the doctrine that communications should be afforded "breathing space" that provides protection even for mistaken or erroneous statements. The Court of Appeals' analogy to such claims as "injurious falsehood" or trade

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or a burglar alarm is fail-safe. In any event, Hydrolevel's claim in this regard has no effect on the validity of ASME's interpretive letter, which was written about time delays in the abstract and not about Hydrolevel's product in particular.

libel was particularly inappropriate, because this tort has been carefully developed in a manner that protects speech. Finally, the Court of Appeals' opinion is inconsistent with the associational interests of volunteers in professional societies, since it would require procedures consitituting a deep intrusion into their employers' business and would induce reliance on orthodoxy and homogeneity rather than diversity.

ARGUMENT AND AUTHORITIES

I. THE COURT OF APPEALS' HOLDING WOULD PENALIZE PROFESSIONS THAT ATTEMPT TO SET HIGH STANDARDS.

A. An Antitrust Lawyer Would Likely Advise a Professional Association to Avoid the Setting of Meaningful Standards Because of the Court of Appeals' Decision.

Any antitrust lawyer worth his salt would advise a professional association to limit the setting of standards after the opinion of the Court of Appeals in this case. If this prediction seems unduly pessimistic, it should be pointed out that written examples of precisely such advice, resulting from similar decisions, are to be found. See, e.g., Millstein & Buc, Supreme Court Ruling Adds Fuel to Debate over Health Planning, NATIONAL L.J., July 13, 1981, at 26. Millstein and Buc advise health care insurers to "limit their implementation" of the National Health Planning and Resources Development Act of 1974. Their reason for suggesting this frustration of the intent of Congress is that insurers must do so to "minimize their antitrust exposure" in response to a recent decision of this Court. Id. at 29.

The "limiting of implementation" that would be caused by the Court of Appeals' opinion in this case would be even more pronounced, and it would affect precisely the most useful sort of professional self-regulation. To be meaningful, a standard must result in a curtailment of the business practices of at least some

in the profession. A standard that the lowest common denominator already meets would hardly be worth adopting. But if a professional or a businessman is affected adversely by a standard, human nature will lead him, rightly or wrongly, to view it as Hydrolevel viewed the interpretive letter here—that is, as inappropriate. Since such a standard is by definition promulgated by a group of other professionals, the situation provides a natural basis for the claim that it is the result of a "contract, combination or conspiracy" of his competitors to "restrain trade" by limiting his business activity. The additional litigation that would thus face a professional association adopting meaningful standards amounts to a powerful deterrent even if one assumes the association can prevail in all such suits, because of the expense of defense.

An antitrust lawyer would counsel an association such as ASME that it could avoid this added litigation in several ways.— First, it could curtail the promulgation of codes. (Few professions have promulgated these in numbers approaching ASME's, in any event.) Secondly, it could decrease the issuance of Code interpretations, leaving the public to read the Code as best it can. (Interpretations are particularly likely to create claims of the type at issue here, because they translate generalities into specifics.) Third, it could ensure that its Code or interpretations are composed of platitudes that do not affect the activities of any business in any meaningful way. ASME's adoption of the Court of Appeals suggestion that it should have "review procedures" that would "guard against" the events in this case in a "stringent" manner could succeed only if it also amounted in some degree to the adoption of one of these three approaches.

B. The Natural Tendency of Professions Is to Set Standards Accomodating the Lowest Common Denominator, and This Tendency Would Be Encouraged by the Court of Appeals' Opinion.

Even without the Court of Appeals' opinion in this case, professions have an inherent tendency to avoid meaningful standards and to prefer codes consisting of pious but unenforceable

homilies. Unless a professional association exercises vigilance and courage, it will unconsciously adopt procedures of a sort that would satisfy the Court of Appeals' suggestion at public expense —procedures designed to ensure that such standards, guidelines, policies, Codes of Professional Responsibility, or other professional norms as result from its convocations do not curtail activities its members desire to engage in, even to protect the public. It can often justify such a failure to regulate itself by reference to high-sounding ideals or other external justifications. The Court of Appeals' opinion would furnish precisely such a justification here.

A desire to protect the traditional prerogatives of attorneys, for example, has led to a Code of Professional Responsibility that has been frequently attacked as insufficient to protect the client. The following excerpt from Burt, Conflict and Trust between Attorney and Client, 69 GEO. L.J. 1015, 1042 (1981), is one recent scholarly statement of the idea:

> . . . The desultory character of current mechanisms for enforcing professional standards of conduct is one powerful indication of the professions' disinclination to probe the attorney-client relationship. Disciplinary proceedings by the organized bar are suspiciously rare occurrences . . . . The statistics suggest . . . that the organized bar turns a collective blind eye to substantial numbers of inappropriate attorney-client transactions.

The statistics bear out this assertion. See Steele & Nimmer, Lawyers, Clients and Self-Regulation, 1976 AM. BAR. FOUND. RESEARCH J. 917, 979 (comparing complaints with bar actions); Martyn, Lawyer Competence and Lawyer Discipline: Beyond the Bar?, 69 GEO. L.J. 705 (1981). Cf. M. Bloom, The Trouble with Lawyers 157-91 (1968). The inability of the legal profession to regulate itself has been described as "endemic." Marks & Cathcart, Discipline within the Legal Profession: Is It Self-Regulation?, 1974 U. ILL. L.F. 193, 196 (1974).

This inability to maintain high minimum standards is a general phenomenon among professions. For another example from a very different profession, see Funeral Industry Guidelines Cri-

ticized, Houston Chronicle, July 8, 1981, sec.1, at 1, col.1 (reporting consumer opposition to Nation Selected Morticians' "package pricing" guidelines as "worse than no rule at all"). The point is not that these professions are particularly "bad" ones. Rather, the point is that against this background, ASME's more than 400 codes and standards represent a real and substantial achievement, overcoming the tendency to protect the profession rather than the public.

Adoption of the very Code section whose interpretation led to the inclusion of ASME in this suit, for example, was preceded by a history of boiler "dry-firing" that resulted in many instances of injury, death and property damage. The evidence shows that since promulgation of the BPV Code, such accidents have been virtually eliminated. An attorney would be hard pressed to point to a single section of his profession's Code that incorporates safety procedures that have eliminated the incidence of any undesirable practice. To the extent that its "stringent" rule curtails promulgation or interpretation of ASME's Codes, the Court of Appeals' reasoning will curtail service that is clearly in the public interest.

C. These Considerations Are Relevant to Determining Whether ASME Should Be Adjudged To Have Participated in a Conspiracy in Restraint of Trade.

This analysis should be viewed as relevant to the question whether a professional association in ASME's situation should be considered to have violated the Sherman Act. The language of that Act—requiring a "contract, combination or conspiracy" in "restraint of trade"—is flexible. It was intended by Congress to permit beneficial business transactions, even if they resulted in some restriction. Its application depends on the nature of the activity and its context. Indeed, the beneficial aspects of professional self-regulation have already been recognized as an important factor in a case such as this:

> It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically apply to the professions antitrust concepts which originated in other areas. The public service aspect and other features of the profession may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.

Goldfarb v. Virginia State Bar, 421 U.S. 773, 788-89 & n.17 (1975); cf. National Gerimendical Hospital v. Blue Cross, 49 U.S.L.W. 4672, 4676 (U.S.S.Ct. June 15, 1981) (cost-containment procedures adopted by health insurance consortium in cooperation with Health Systems Agency may be accorded flexible antitrust rules in order to "make [cost-containment] work"). Significantly, the present case does not involve pricing or other sensitive antitrust problems. Instead, it involves the setting of professional standards, which has been described as a professional associations' most important and appropriate activity. See Symposium, Trade and Professional Association Ethics and Standards, 46 ABA ANTITRUST L.J. 653 (1978).

In the Court below, Hydrolevel attempted to characterize arguments such as these as though they were efforts to claim an antitrust exemption for nonprofit associations. Amicus curiae does not advocate any such thing and does not so understand ASME's argument. If a nonprofit entity such as this amicus curiae should participate intentionally in a scheme to monopolize, fix prices or divide markets, or if ASME were to do so, the nonprofit nature of the entity should obviously not provide a defense. All that is here contended is that the beneficial aspects of the activity that would be curtailed ought to be considered in determining whether the activity should be considered a restraint of trade.

The rule adopted by the Court of Appeals—that apparent authority is sufficient to hold liable a professional society for the actually unauthorized acts of its volunteers— is a species of strict liability. In fact, the very purpose of apparent authority is to make the care taken by the defendant irrelevant and to im-

pose liability based merely upon the result (the external appearance that is created), irrespective of the real intent of the defendant. Professional associations are already an antitrust battleground. They are the frequent target of liability claims that already discourage some beneficial activity. Those claims are perhaps unavoidable, since professional associations are and should be subject to the antitrust laws, and the curtailment of some beneficial activity and the assertion of some unmeritorious claims are the price that must be paid. The strict liability approach of the Court of Appeals, however, would exact a price that would be disproportionate.

II. DISCOURAGEMENT OF PROFESSIONAL SELF-REGULATION WOULD CREATE A CORRESPONDING NEED FOR GOVERNMENT STANDARDS, WHICH UNAVOIDABLY CONSTITUTE A FAR GREATER IMPEDIMENT TO NEW PRODUCT DEVELOPMENT.

To the extent that it discourages appropriate self-regulation, the Court of Appeals' decision will create a corresponding need for government licensing to replace it. Such a scheme of compulsory certification will inevitably and unavoidably be inferior to voluntary compliance with standards recognized in the marketplace. In the first place, a government command system is less desirable than a voluntary one simply because it prevents the personal freedom to buy and sell the particular products one wants. If government rather than ASME had been interpreting the BPV Code here, it would likely have proceeded by flatly barring the sale of the product—even to those who wanted it, such as Brooklyn Union Gas Co. ("BUG"). Secondly, there is the fact that government promulgates regulations using taxpayer funds that are thus diverted from some other need. For example, it cost an almost unbelieveable 8.5 million dollars—more than the trebled damages that were reversed in this case as excessive—for the Department of Energy to promulgate a single set of guidelines designed to make household appliances more

energy-efficient. ASME performs such functions at no charge by harnessing the desire of its members for part-time public service.

In the third place, compulsory regulation lacks economic efficiency. A sufficiently complex regulatory process to take into account all variations in the weighing of costs and benefits that buyers and sellers are likely to exhibit in the real marketplace would be too cumbersome to administer. Seldom does a nonprofessional bureaucracy have the expertise to promulgate accurately targeted regulations in technical fields. Furthermore, an agency capable of duplicating the work of ASME would naturally grow, and would attempt to enlarge its personnel, jurisdiction and budget. Finally, the most ironic aspect of Hydrolevel's claim against ASME is that the delay and expense associated with government standardmaking are far more likely to destroy the marketing of new and useful products. Situations far more serious than Hydrolevel's experience are simply the norm in regulated industries.

One might tend to underestimate the nature of this undesirable effect of government regulation on new product introduction unless one considered examples. The Food and Drug Administration is illustrative. During the week before this brief was printed, in fact, the following report appeared in Newsweek, July 27, 1981, at 63:

> . . . The U.S. Food and Drug Administration banned cyclamates as sugar substitutes in 1969 because of evidence they caused cancer. Only Congressional action has kept the agency from taking saccharin off the market for similar reasons. Last week, after an eight-year controversy, the FDA finally approved the marketing of aspartame, a low-calorie sweetener that the manufacturer says tastes more like sugar than any of the other substitutes.
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> . . .
>
> [G.D.] Searle [& Co., aspartame's manufacturer] had a tortuous time getting the FDA to accept aspartame. The agency initially approved the sweetener in 1974, but rescinded its action the next year when . . . a psychiatrist at Washington University . . . claimed that the substance

caused brain damage in animals . . . .

While Searle embarked on further safety tests, the FDA appointed a "scientific board of inquiry" . . . . The board concluded last year that most of the evidence for neurological damage was unfounded, but suggested that further studies be made to determine whether aspartame caused brain tumors in animals. Exasperated, Searle sued the FDA to force a decision. . . . Final approval came when the FDA's own Bureau of Foods decided that the brain tumor evidence was flimsy at best. "Few compounds have withstood such detailed testing and repeated scrutiny," said FDA commissioner Arthur Hays Jr. "The process . . . should provide the public with additional confidence about its safety."

However, the author of this piece concluded that "The process also provides a good case history of the FDA's extraordinarily elaborate and time-consuming requirements." Id.

The point is not that FDA handled aspartame inappropriately. It was following its governing statute and its usual procedure. Rather, the point is that G.D. Searle's situation illustrates the plight of a manufacurer subject to compulsory standards, even when the administrator of those standards, the FDA, functions as it should. The comparison to Hydrolevel's situation is striking. Hydrolevel's assertion of a miscarriage of justice was addressed completely and promptly by ASME upon Hydrolevel's first complaint, and Hydrolevel, unlike Searle, was never under a compulsion not to market its product. The point, in other words, is that the partial replacement of ASME's function by a federal Administration would not be in the public interest, even though the necessity of such replacement would be created by the Court of Appeals' opinion.

To the extent that the Court of Appeals' decision has the effect of decreasing ASME's activity in setting and interpreting standards that delay or impede marketing of new products, that decision will have the corresponding effect of requiring the substitution of government action to perform precisely the same function with an unavoidably decreased efficiency. The funeral

industry's failure to set meaningful standards has prompted the FTC to promulgate compulsory rules. See Funeral Industry Guidelines Attacked, Houston Chronicle, July 8, 1981, sec.1, at 22, col.1. Failure of the attorney grievance process in Texas has led to legislation empowering the State Supreme Court to take it over. The notorious failure of professional sports to check inappropriate violence has led to calls for the enactment of a statute so vague that it would require detailed regulatory interpretation to be understood. See Sprotzer, Violence in Professional Sports: A Need for Federal Regulation, 86 Case & Comment 3 (1981); Sports Violence Act of 1980, H.R. 7903, 96th Cong., 2d Sess. (1980). There can be little question that failure of a profession to promulgate standards in areas involving such serious questions of public safety as do ASME's codes would create a vacuum that the government would fill simply out of necessity. When standards in these matters are lacking or inadequate, the potential consequences are illustrated by such events as the recent structural collapse of hotel walkways at the Hyatt Regency in Kansas City, which occurred during the preparation of this brief. See Hotel Toll Hits 111 in Kansas City, Houston Chronicle, July 19, 1981, sec.1, at 1, col.1. There can be little question that any decrease in ASME's activity will either create similar accidents or, more likely, induce governmentally set and supervised standards.

A further irony is that the misuse of the resulting regulatory system of government as a means of stifling competition would be immune from liability under the antitrust laws. Thus if ITT and Hartford Steam were to elicit government standards that had the effect of excluding Hydrolevel from competition, there would be no claim upon which relief could be granted—not only not against the government, but not against ITT or Hartford either. See Parker v. Brown, 317 U.S. 341 (1943); cf. National Gerimedical Hospital v. Blue Cross, supra. This immunity would exist even if the competitors conspired with government agents openly, intentionally, maliciously and for the express purpose of monopolizing the trade. As the present case indicates, standards imposed through a professional association do not carry immunity for those who use them intentionally to restrain trade; ITT

and Hartford recognized the possibility that their intentional conduct might constitute an antitrust violation. In addition, antitrust laws provide a check against intentional participation by a professional association itself. However, the "apparent authority" reasoning of the Court of Appeals, with its attendant strict liability standard, would so discourage professional self-regulation as to necessitate government action that would ironically create an ipso facto exemption from the very laws against restraints of trade that are asserted here.

III. THE COURT OF APPEALS' OPINION ENCROACHES UPON SPEECH AND ASSOCIATION PROTECTED BY THE CONSTITUTION.

A. The Strict Liability Standard Imposed by the Court of Appeals Is Inappropriate in an Area Involving Communication of Information, which Should Be Afforded "Breathing Space"

In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), a newspaper had been held liable under State libel laws for printing false information contained in an advertisement furnished it by a source acting to further its own motives. This Court, while recognizing that a State had a valid interest in its libel laws, held that the first amendment to the Constitution barred such a claim in the absence of "actual malice" actually attributable to the newspaper. Robust, wide-open debate would be inhibited by any other rule, since timely speech required "breathing space." The holding of the Court of Appeals, which is cast not in the terminology of breathing space but rather in the rhetoric of strict liability, is an inappropriate approach to the case.

This case involves speech. The "tort" of which ASME here has been convicted in the lower courts consists entirely of the dissemination of information. There is no question the speech here at issue is of a protected kind. In the first place, commercial speech designed solely to promote the ends of the speaker is protected. E.g., Bates v. Arizona State Bar, 97 S. Ct. 2691

(1977). In the second place, the speech here at issue, which is disseminated to the public for general purpose use without expectation of economic benefit to ASME, is a higher level of speech than commercial advertising, as is a newspaper.

Although the antitrust laws serve important societal purposes, they do not occupy a higher Constitutional status than libel laws. They are, like the libel laws, limited by the first amendment. There can be no question that the crushing burden of liability imposed in this case constitutes as real a deterrent to the protected speech in which ASME engages as the application of strict liability for libel against the New York Times would to news reporting. The Court of Appeals viewed it so; it reasoned that its holding would make persons in ASME's situation exercise "greater care" before they engaged in communications.

Hydrolevel's argument, in essence, is that the state of mind and motives of Hardin should be attributed to ASME, in that he provided the information by which Hoyt answered M&M's inquiry. To do so would be similar to attributing the motives of a source to a newspaper editor in a strict liability context. Newspapers are constantly faced with the problem of dealing with volunteer sources that have motives to falsify. They may work with, and present to the public by direct quotation, many sources with whom they deal on a regular basis and in a close and cordial manner. Statements of a mayor of a City about one of his political rivals, or by the manager of a professional baseball team about a players' strike, are examples. It is to be taken for granted that such sources will attempt to use the newspaper for their own purposes. But to hold the New York Times liable for the printing of even a provably false quote from such a source—or for that matter, for printing something written by an advertiser whom the paper holds out as authorized to use its pages explicitly for the advertiser's own purposes—would create a deterrent to communication. So would the opinion of the Court of Appeals here.

Even if the first amendment is itself not applicable here, these concerns are important to determining whether ASME's actions made it a participant in a contract, combination or conspiracy "in restraint of trade." A construction of the antitrust laws that

would discourage the dissemination of information that is itself necessary to trade would not appear to follow the intent of Congress. The decisions interpreting the antitrust laws have, in fact, so held. "[I]n the absence of bad purpose, mistakes made in the formulation or maintenance of standards do not subject one to . . . antitrust liability." Structural Laminates, Inc. v. Douglas Fir Plywood Ass'n, 261 F. Supp. 154, 159 (D. Ore. 1966), aff'd, 399 F.2d 155 (9th Cir. 1968). As this Supreme Court has stated:

> . . . the Sherman law neither repeals economic laws nor prohibits the gathering and dissemination of information. Sellers of any commodity . . . would hardly be deemed to be conspirators engaged in the restraint of interstate commerce . . . . merely because they became stockholders in a corporation, or joint owners of a trade journal, engaged in the compiling of reports.

Maple Flooring Mf'rs Ass'n v. United States, 268 U.S. 563 (1925). The Court held, there, that even an effect of "stabilizing prices," absent a motive to engage in price fixing, did not render the communications at issue a violation of the antitrust laws.

B. The Court of Appeals' Reinterpretation of ASME's BPV Code, and Its Foundation of Liability upon Disagreement with ASME's Own Interpretation, Is an Inappropriate Approach to Protected Speech.

The interpretation of formal language such as the BPV Code may require reference to more than its literal words. The intent underlying the language may be relevant, as may the precise circumstances to which it is applied, or changes in technology, or consumer expectations. Situations might even be found in which an interpretation that is superficially at variance with the literal language may be the most appropriate one; such situations arise not infrequently in the law. For these reasons, ASME's interpretation of its own code should not have been used to impose liability upon it even if nominally inconsistent with the Code. However, that was precisely the approach of the Court of Appeals: in essence, it held that a professional association cannot

appoint a spokesperson to interpret standards without potential liability unless "stringent" procedures ensure that a contrary interpretation may not be reached later.

The Court of Appeals actually labelled the letter written by Hoyt as "fraudulent." This conclusion, which was apparently based on the Court of Appeals' conclusion that the letter was inconsistent with the Code, was erroneous. As is shown above (in the Statement of Facts, subsection C), the letter was factually accurate. A time delay functions by interdicting or removing the required automatic cutoff for a period of time and thus violates the requirement of an operative safety device, even if that requirement is read literally. The letter must be read in the context of the inquiry to which it responded; that inquiry expressly assumed a time delay that would operate only after the water was below the visible range on the gauge glass, an arrangement that would clearly violate the literal terms of the Code, as well as its intent. The response, furthermore, was not cast in terms of any specific device. Finally, the statement is factually accurate and consistent with the intent of the Code unless one assumes, as did the Court of Appeals, an additional fact contained in neither the inquiry nor the response: that the cutoff would be activated well in advance of the time the water reached the bottom point. These circumstances do not support the Court of Appeals' conclusion that the letter was "fraudulent." At most, they show that the inquiry could have been answered by a differently worded response, but to so conclude is not to say that the interpretive letter (which after all, was an interpretation) was "wrong" or should subject ASME to liability.

This case is an example of the reason underlying the rule of New York Times v. Sullivan. "[A] great danger of self-censorship arises from the fear of guessing wrong—the fear that the trier of fact, proceeding by formal processes of proof and refutation, will after the event reject the individual's judgment of truth." L. Tribe, American Constitutional Law 634 (1978). The Court of Appeals' opinion would justify that concern, encouraging professions to engage in self-censorship rather than in protected speech on issues of public safety.

C. The Court of Appeals' Comparison of the Communications Here at Issue with the Common-Law Claim for Disparagement, which Is Carefully Limited to Protect Communications, Should Have Led to the Opposite Result.

The Court of Appeals reached its result, in part, by comparing the antitrust laws to other business "torts," including especially the common-law action for "injurious falsehood" (also called disparagement or trade libel). Since the Court concluded that the evidence here showed "essentially a fraud," it considered that the differences between this case and one for injurious falsehood could "hardly be material." Ironically, however, if the claim here were for trade libel, the required elements of proof would clearly foreclose Hydrolevel's recovery.

The law of trade libel has been carefully limited, over the years, to allow breathing space for statements of opinion that harm economic interests, on the theory that the dissemination of precisely such communications is what makes a competitive market competitive. Thus the "injurious falsehood" claim requires proof of malice attributable to the defendant. It also requires clear identification of the plaintiff's product, which is lacking here. It contains various kinds of privileges designed to protect even mistaken statements in the nature of product comparisons. The burden of proving factual falsehood is on the plaintiff, and "mere general statements of comparison" do not suffice. Neither do "statements of opinion," which, presumably, would include an opinion as to the interpretation of a Code. "[T]he tort has never been greatly favored in the law." W. Prosser, Torts 915-926 (1971). It was only natural that Hydrolevel abandoned its state law claims before trial for these reasons, and that it proceeded to trial on a theory that had had few occasions to be tested against limits designed to protect communications.

D. The Court of Appeals' Decision Constitutes an Unwarranted Infringement of the Interest of Vol-

unteers in Associating for the Advancement of Their Professions.

Americans are the most generous people in the world. Monetary charitable contributions annually exceed $ 200 for each man, woman and child in the United States; the world's runner-up is Canada, with a much smaller $ 35 per capita annually. See Extra, July 1981, at 22 (reprinted from The Washington Post). In-kind contributions of volunteer service probably exceed this amount, if ASME's members' performance is any indication. Americans volunteer their professional time because they receive something of inestimable value in exchange: association with others. The Court of Appeals' directive that an association must be more restrictive with its volunteers translates into a suggestion that the association refuse precisely the services of those volunteers who are most skillful, qualified and informed and that it tend to avoid allowing volunteers to deal with matters that are controversial. This aspect of the holding is not only opposed to the interest of the larger public, but also constitutes an unwarranted infringement of the interest of volunteers in associating for the advancement of their profession.

The Court of Appeals' reasoning does not take sufficient account of the nature of associations and the committees that professional associations tend to create. The emphasis should not be on orthodoxy or acceptability of point of view. Instead, persons with varying viewpoints and conflicting interests should be permitted to participate. The sort of "screening process" contemplated by the Court of Appeals' opinion would reduce to an insistence upon homogeneity of those having responsibility. It is submitted that committee members, and for that matter committee chairpersons, should not be selected on such a basis. A professional association should be able to have persons of widely differing views serve as committee chair in sequential years without fearing that it is exposing itself to disparate antitrust liability in the two years.

The Court of Appeals especially criticized the absence of "review procedures." In fact, ASME already has a procedures

manual for its BPV Code that appears to rival the Federal Rules of Civil Procedure for complexity. Hoyt's handling of the M&M inquiry was guided by a choice between sections 8.01 and 8.02 of the Manual; other established procedures allowed the chair to determine whether the inquiry should be answered formally or informally. The Court of Appeals criticized the "unsupervised" nature of this decision. The alternative would be to place the chair in the position of delaying all answers to inquiries until a full committee meeting could consider them in plenary session, an approach that would mean that many inquiries would simply go unanswered. It is not the function of a procedural system to remove all discretion of individuals. Instead, the purpose is to guide discretion. See generally K. Davis, Discretionary Justice (1976). The public perception of unduly complex procedures is that of "red tape," and it is unpleasant either to be in or to deal with the sort of organization in which "no one has the authority to make a decision."

The intrusion into the relationship of volunteers with their employers suggested by the Court of Appeals' reasoning would be especially counterproductive. Should an association prevent all who might have a "conflict of interest" from serving in any policymaking capacity? If so, there might literally be no qualified industry persons who could serve on a committee handling a controversial issue. Should the association investigate the motives of a volunteer? If so, how? Can it safely accept the statements of the volunteer that he is acting in the public interest rather than to serve some narrower interest, or must it contact the volunteer's employer to find out whether he has misrepresented the facts? Learning the potential motives of a volunteer's employer with respect to evolving technology would require extensive investigation into the employer's private business. Indeed, the Court of Appeals does not suggest even that a searching inquiry directed to the employer would be sufficient; the employer too may have undesirable motives and may perpetrate the sort of misuse of trust that was perpetrated upon ASME here.

And once one had learned of a volunteers' motives, it is not at all clear what a professional association should do. If it finds

that his views and his employer's interest happen to coincide, or even that his decisions are likely to further the interests of his employer, should it refuse to allow him to participate? If so, it would disallow participation by most in the population, because it is submitted that such a description would fit most professionals. Perhaps in a situation involving the setting of standards affecting competing products, the association should disallow persons with a potential conflict from participating. But if a duct is indeed defective, the persons most likely to be in a position to make that fact known are likely to be employees of its manufacturer's competitors.

It must be remembered that the situation ASME perceived in this case was that of an ostensibly neutral volunteer (a vice president of a boiler insurer), who provided a facially defensible interpretation, without factual inaccuracy, of one section of a Code of over 18,000 pages, the Code being one of more than 400 and the interpretation being one of 20,000 to 30,000 such interpretations per year. This communication, in a single instance, produced a judgment exceeding by many times the entire annual budget of the association. The only way the probability of such an occurrence could be lessened would be by extensive investigation of each volunteer. "Review procedures" that would prevent it would be expensive and cumbersome. Their adoption would please no one but antitrust attorneys, for whom the instant case is a kind of Professional Association-Lawyer's Relief Act. It is likely that no preceding investigation or subsequent review could have detected the needle in a haystack that constituted this breach of ASME's trust. The value of such procedures is small in comparison to the substantial infringement they would work upon the freedom of sincere volunteers to associate.

Amicus curiae does not contend that Constitutional protection of the freedom of association would, itself, prevent Congress from producing such a result as this, if Congress intended to do so. The decisions of this Court indicate that indirect discouragement of association is not sufficient to render a statute unconstitutional (although the Constitutional pro-

hibition can be invoked by a particularly severe application). E.g., Buckley v. Valeo, 424 U.S. 1 (1976). However, it is submitted that serious associational interests are at stake here, and the argument raises the question whether Congress intended such a drastic result when it prohibited conspiracies in restraint of trade. The view of the Court of Appeals, which would encourage groups such as ASME to curtail thousands of volunteer transactions in order to prevent a single incident, is an unreasonable construction of that language.

CONCLUSION

For the reasons here stated as well as those expected to be set forth in the brief of petitioner ASME, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have deposited in a United States post office, postage prepaid, three copies of the above motion and brief to counsel for each party, namely: Harold R. Tyler, Jr., Patterson, Belknap, Webb & Tyler, 30 Rockefeller Plaza, N.Y. 10020; and Carl W. Schwartz, Metzger, Shadyac & Schwartz, One Farragut Sq., S., Washington, D.C. 20006.